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CONFUSION OF PROPERTY WITH PRIVILEGE: THE DARTMOUTH COLLEGE CASE.

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The doctrine that corporate charters and franchises are contracts and not subject to repeal has been in some measure evaded in many of the States by reservation of the power of repeal or amendment. Yet the statement of Mr. Cotton is still true, that the doctrine of the sacredness of charters and franchises, growing out of the Dartmouth College case decision, "has woven itself into the tissue of our law, as has, perhaps, no other paper-made doctrine of constitutional law."

One of Marshall's eulogists has said that the effect of this decision was "to withdraw the obligations of contracts from the power of the State Legislatures to impair their validity, and to place them also beneath the protecting egis of the Constitution." In truth, it did nothing of the sort. The protection of ordinary contracts from impairment by the States was effectively secured by the words of the Constitution. What Marshall and his associates did was by a forced and unheard-of construction to include, under the term "contracts," certain acts of legislation which ought to be at all times open to repeal or amendment. The royal charter given to Dartmouth College in 1769, providing that the college should always be governed by a self-perpetuating board of twelve trustees, was declared to be forever binding on the State of New Hampshire. Under the clause in the Federal Constitution forbidding any State to pass laws "impairing the obligation of contracts," it was held that the Legislature could not increase the number of trustees to twenty-one and provide temporarily for the appointment of new trustees by the governor and council.

The chief question in the case was thought to be, whether this institution was public or private. The highest court of New Hampshire had pronounced it public. Chief Justice Marshall

admitted that the purpose of the institution was public, that "education is an object of national concern" and that "there may be an institution founded by government, and placed entirely under its immediate control, the officers of which would be public officers, amenable exclusively to government." His decision was based on the conclusion that this institution was founded by private parties with private funds and that the incorporation did not change its character except to make it "immortal" and its management more convenient. He took no account of the principle, declared by one of his successors in 1876, that certain institutions or enterprises, conducted exclusively with private funds but having a purpose "affected with a public interest," are proper subjects for State regulation and control.

Among the mistakes of law and fact contained in the reasoning of the court, there are two very serious ones which relate to the particular facts of this case. First, Dartmouth College was in fact public in its foundation and endowment as well as in its purpose; and, second, the college charter contained no such contract as the court assumed to find and enforce.

(1) Unfortunately, counsel for the State were outgeneraled and did not get all important facts into the record sent to Washington. But many additional facts were brought to the attention of the Supreme Court in connection with the three additional cases begun in the United States Circuit Court and certain motions made before the Supreme Court in the college case proper. Mr. Shirley concludes that Marshall knew the essential facts. This author shows that the large sums of money collected in Great Britain and America by Eleazer Wheelock, which Marshall says were paid to the corporation "on the faith" of the "contract" between "the donors, the trustees and the crown," were never contributed or paid to Dartmouth College at all, but to Moor's Indian Charity School. This school, founded by Wheelock and already endowed by Josiah Moor, although carried on by Wheelock on the same grounds as those occupied by the college, was kept entirely separate from Dartmouth College in management and financial support. It appears almost certain that the first endowment of the college was the gift of public land presented on behalf of New Hampshire by John Wentworth,

Colonial Governor, soon after he issued the charter. Other public donations by the State followed, as well as certain private donations. The massive structure of conclusions based by the court on the alleged "private foundation" falls to the ground.

"The Earl of Dartmouth and the other trustees in England,' whom Marshall names as probably "the largest contributors," on April 25, 1771, wrote to Dr. Wheelock:

"We shall expect that you keep a regular and distinct account of all moneys laid out in erecting the school, educating Indian youths, and equipping and maintaining missionaries agreeable to the design of our institution, and that you do not blend them with your college, and other matters foreign to and separate from our undertaking."

On November 9, 1770, Dr. Wheelock had written to one of these English trustees:

"The charter was never designed to convey the least power or control of any funds collected in Europe, nor does it convey any jurisdiction over the school to the trustees of the college. . . . If I resign my office as president of the college, I yet retain the same relation to the school and control of it as ever."

It is supposed that the college was named after the Earl of Dartmouth, instead of after Governor Wentworth, its real benefactor, in order to mollify the displeasure felt by the noble Earl and his co-trustees at Wheelock's failure to stick to the original plan and confine his attention to the Indian Charity School, a purely missionary enterprise.

(2) The Chief Justice said: "It can require no argument to prove that the circumstances of this case constitute a contract." The contract which Marshall enforced against the State of New Hampshire was a supposed agreement, by the English King, that the charter should not be repealed or amended in essential particulars by any future legislative act. But the late Chief Justice Charles Doe, delivering the opinion of the New Hampshire Supreme Court in 1886 in the case of Dow *v.* Railroad Company, has shown that if George III had attempted to make the contract with Marshall enforced, he would probably have lost his crown and the agreement would have been plainly illegal and void under the English Bill of Rights of 1639 and the Act

of Settlement of 1701. James II had been deposed in 1688 for making contracts of this sort, that is, for assuming to suspend or nullify the legislative authority of Parliament. While the college charter contains suitable language to indicate that the grant, so far as the King was concerned, was to be permanent rather than for a term of years and would not be revoked or changed by him, it contains no word suggesting that the King or his agent, Governor Wentworth, had any intention of promising exemption from legislative authority and control. The English Parliament has always had, and on occasion has exercised, the power to repeal and amend corporate charters.

Even though the Supreme Court erred in treating Dartmouth College as a "private school," and in enforcing a so-called contract which no one ever dreamed of making, the question of chief importance remains: If a corporation is "private" in the sense in which Marshall used the term, and if a State Legislature has unequivocally attempted to make its charter and privileges irrepealable, is such an act a contract protected by the Federal Constitution from change by any future Legislature?

The prohibition against "laws impairing the obligation of contracts" had its origin in the provision of the "ordinance of 1787" for the government of the Northwest Territory, to the effect that no law should be made interfering with or affecting "private contracts or engagements" previously formed. The proceedings of the Constitutional Convention indicate that the purpose of modifying this language was to restrict rather than to enlarge its scope.

Very important evidence as to the intended meaning of this provision is found in a report made to the Maryland Legislature by Luther Martin, a distinguished member of the convention from that State. He said he had opposed this "contract" clause of the Constitution because he thought the States should have the power, in times of public calamity or distress, to pass laws "totally or partially stopping the courts of justice, or authorizing the debtor to pay by instalments, or by delivering up his property to his creditors, at a reasonable and honest valuation." These were the practices, theretofore common in the States, which the clause was designed to prohibit. If Luther Martin had

known of any claim that its scope was wider than private contracts and that it would forbid the repeal or alteration of numerous legislative acts, it is not conceivable that he would have neglected to state the fact to his State Legislature. It is no more conceivable that such an intended invasion of the rights of the States could have crept into the Constitution without the strongest opposition.

That the term "contracts" was designed to include only agreements between private parties, is most probable. If any agreements by States were held to be contracts in the constitutional sense, none could reasonably be so included except agreements made by the State in its private capacity, as when, for example, it should borrow money, employ workmen or contract for the erection of a public building. Acts of legislation, done in the public capacity of the State, were excluded by reason, sound policy and the general understanding of men.

If the power of individuals to organize themselves into a corporation is not to be considered a special privilege conferred by the State, but is a common right regulated by general laws, no legislative act relating to incorporation can be considered a "contract." It is only with reference to special powers, not possessed by all citizens in common, that the "contract" claim is made. But if we conclude that the mere right to exist as a corporation is a franchise or special privilege, and if we admit that sovereign States have authority to grant special privileges to individuals, such a grant must of necessity be only temporary.

That a special privilege, once granted, cannot be withdrawn, is a contradiction of the original powers of sovereignty and is abhorrent to the intellectual perceptions as well as to moral principle. If a State is to grant privileges to some, it must have the power to do so by withdrawing privileges from others. The result of any "contract," therefore, which makes a special privilege irrevocable is to subtract a portion of sovereignty from the State and confer it upon individuals. But sovereignty, in its very nature, is continuous and indestructible. If a part of it may be lost, the whole may be lost by successive losses of different parts, a result absurd and unthinkable. This principle is well stated by Chief Justice Doe: "The agents authority

to make law does not enable them to suspend their own duty, and bind their principals, by agreeing with a third party that law shall not be made." The prohibition in the Federal Constitution against "impairing the obligation of contracts" was never intended, could not in logic or reason have been intended, to prevent a State from preserving its own integrity, from retaining the power to legislate as fully and completely next year as it can legislate this year, from withdrawing any special privilege which it has granted.

If the mere right to be a corporation is a special privilege which a present Legislature cannot guarantee against repeal or change by a future Legislature, much more is this true of those immensely valuable privileges, so often granted in corporate charters or elsewhere, by which the most important powers of sovereignty are claimed to have been "contracted" away to private parties. These powers vary from the most trifling up to some of the very highest and most essential, among which are the power of maintaining the existence of the Government by taxation and the power of protecting citizens from the extortions of monopoly.

The chief precedents for the decision in the Dartmouth College case were two cases in which Marshall had delivered the opinion of the court. In one of them, Fletcher *v.* Peck (1810), the court extended the "contract" clause of the Federal Constitution to prevent an act of alleged confiscation by the Legislature of Virginia. There are few lawyers who will not admit that this was a judicial amendment of the Constitution by means of a clever legal fiction. This case is generally regarded as having been collusive, a mere sham battle in which both parties desired to obtain the same decision. The evidences of collusion were so plain, upon the face of the record, that they were remarked by Justice Johnson in his opinion. In New Jersey *v.* Wilson (1812) Marshall had held that the State of New Jersey had contracted away forever the right to tax certain private lands and that this "contract" was protected by the United States Constitution. This case also is open to grave suspicion of collusion, and practically no lawyer now defends the decision on any ground.

The principle assumed to have been established in the Dartmouth College case has been refuted and repudiated many times by the Federal Supreme Court. The case still has the force of law within a narrow scope, and it is often referred to in terms of great politeness. But when the court musters up the courage to overrule it, few arguments will be needed in addition to its own opinions. Certain of the State Supreme Courts, notably that of Ohio, long and persistently stood out against a recognition of the doctrine of this case.

Before Marshall's death in 1835 he and Story were sharply overruled by a majority of the court in Ogden *v.* Saunders, in which it was decided that the prohibition against laws impairing the obligation of contracts does not apply to contracts made subsequent to the enactment of the law in question. Mr. Cotton, referring to Marshall's dissenting opinion in this case, says "it is hard to see that it is anything more than ingenious and fantastic."

In the Charles River Bridge case (1837) the court, under the leadership of Chief Justice Taney, decided that though legislative "contracts" may be protected by the Constitution, such alleged contracts must be construed according to a rule directly opposite to the rule applicable to private contracts; in other words, grants of privileges by the State are to be construed strongly in favor of the granting party, while private grants are construed strongly in favor of the grantee. This doctrine, that nothing can be taken from the State unless it is expressly granted, led the court to hold that no exclusive franchise had been granted to the bridge company. Justice Story dissented earnestly, and logically, if the doctrine of the college case was sound.

In West River Bridge Company *v.* Dix (1848), it was settled that a State may, by the power of eminent domain, take back any property or privileges which it has bargained away in a corporate charter or otherwise, making compensation for the value of what it takes. This doctrine is directly inconsistent with the college case decision, as Justice McLean forcibly pointed out in his opinion in the Charles River Bridge case. A violation of contract does not become less a violation by reason of the fact that the protesting privilege-holder is given money on being deprived of what he contracted for.

In the "Granger cases" (1876) it was decided that though a railway corporation is authorized by its charter to make "reasonable charges," the State may by law say what charges are reasonable; and that when property, corporate or otherwise, is devoted to a use which affects "the community at large," such as transportation or storing grain, the conduct of the enterprise and the charges to be paid by the public are matters for legislative regulation. The sacredness of corporate charters was quietly ignored. By rejecting the logic of the Dartmouth College decision, Chief Justice Waite made it possible to control public utility monopolies, such as transportation, telegraphs, telephones, electric and gas lighting, etc., in cases where the charter does not definitely fix the rates that may be charged.

In repeated decisions the Supreme Court has held that the "police power" of the State is held in trust by the Legislature and cannot be contracted away, even by the most solemn and formal agreement ever put in a corporate charter. The police power "extends to the protection of the lives, health and property of the citizens and to the preservation of good order and the public morals.' Under this doctrine, the Legislature may prohibit lotteries, the manufacture and sale of liquor, the carrying on of noxious trades in populous centers, etc., in spite of charters which expressly authorize the doing of the things prohibited. Yet Justice Strong spoke truly when, in his dissenting opinion in the case of the Northwestern Fertilizing Company, he said: "The police power of the State is no more sacred than its taxing power." He might safely have said "than any other legislative power." The majority of the court overruled the Dartmouth College case in principle, though not in name.

Marshall's doctrine that the taxing power can be battered away by special contracts or private parties with the Legislature, has not escaped violent assault in the Supreme Court, though its undoing has been thus far delayed by the fact that it rests on a definite precedent which cannot be dodged, but must be followed or overruled. In State Bank of Ohio *v.* Knopp (1853), Justice Catron, dissenting, said: "The sovereign political power is not the subject of contract so as to be vested in an irrepealable charter of incorporation, and taken away from, and placed

beyond the reach of, future Legislatures. . . . The taxing power is a political power of the highest class, and each succeeding Legislature having vested in it, unimpaired, all the political powers previous Legislatures had, is authorized to impose taxes on all property in the State that its Constitution does not exempt." In Washington University *v.* Rouse (1869) Chief Justice Chase and Justices Miller and Field, dissenting, said, through Justice Miller, that to hold that a Legislature "can, by contract, deprive the State forever of the power of taxation, is to hold that they can destroy the Government which they are appointed to serve." In the words of Justice Miller, the doctrine of irrepealable tax exemptions "must finally be abandoned," but no more certainly than the entire doctrine of irrepealable special privileges to individuals or corporations must be abandoned.

In the Chicago Lake Front case (1892) it appeared that in 1869 the Legislature granted to the Illinois Central Railroad Company a tract of more than one thousand acres under Lake Michigan, the principal part of Chicago's harbor, extending a mile into the lake. The grant having been repealed in 1873, this suit was brought to see if the repealing law was void, as "impairing the obligation" of the original grant. It was decided, four against three, that the repealing law was valid on the ground that the Legislature held the title to submerged land under navigable waters in trust for the people and could not alienate it except in such small parcels, or in such reasonable and limited ways, as might serve the public purposes of navigation, commerce, etc. Justice Field, giving the opinion of the court, said: "The power to resume the trust whenever the State judges best, is, we think, incontrovertible. The position advanced by the railroad company . . . would place every harbor in the country at the mercy of a majority of the Legislature of the State." True as this is, it is no less true that the Legislature holds in trust for the people other public property and privileges, and that the Dartmouth College decision, in utter disregard of this principle, has placed, for example, the streets of every city at the mercy of a majority of the State Legislature or of the municipal body to which legislative power has been delegated.

By acts passed in 1856 and 1865, the Minnesota Legislature

incorporated a railroad which later became the Great Northern, and gave it almost unlimited authority to consolidate with other railroads: but it was provided that the charter could be amended "in any manner not destroying or impairing vested rights." In 1874 a law was passed prohibiting the consolidation of parallel and competing railroads. In 1895 the Federal Circuit Court in Minnesota was called on to decide whether the act of 1874 impaired the contract contained in the charter, the Great Northern having attempted, after 1874, a consolidation did not become "vested" until it was exercised, and therefore the act did not "destroy or impair" any "vested right." The circuit judge held that "there is no distinction, in reason or in the authorities, between the right to a franchise that has been and the right to one that has not been used," unless there has been a forfeiture for non-user; and that "the franchise to consolidate with another railroad corporation was a vested right of this defendant from the time of the acceptance of its grant."

The circuit judge was right—if there is any virtue in the Dartmouth College decision. But the Supreme Court of the United States, only two dissenting, decided that he was wrong, that the right to consolidate did not become "vested" until used. That they did not do the logical thing and overrule the college case decision is to be regretted; but that they refused to apply it, even though using a distinction that does not distinguish, is cause for satisfaction and hope. Justice Brown, giving the opinion of the court, said: "We think it was competent for the Legislature, out of due regard for the public welfare, to declare that its charter should not be used for the purpose of stifling competition and building up monopolies. In short, we cannot recognize a vested right to do a manifest wrong." These are brave and just words. When courageously and consistently applied to the whole field of constitutional law, they will destroy the last vestige of the doctrine resting on the Dartmouth College decision and will restore to the people of the States that complete and continuous control of legislation which the Constitution gave them.

In his dissenting opinion in the Charles River Bridge case, Justice Story expressed the opinion that an exclusive franchise to

build and maintain a bridge across a river between two cities, did not constitute "a monopoly." His definition of monopoly was, "An exclusive right granted to a few, of something which was before a common right," such as, for example, an exclusive right to navigate a river. Because special legislative authority was necessary for individuals who would build a bridge, an exclusive franchise to build one would not deprive any citizen of an already existing right. By the same test, an exclusive franchise to run a street railway or lay gas pipes or string electric wires, would not establish a monopoly. From judges so utterly incapable of economic reasoning or of taking a long look ahead, we should not expect very good law on economic subjects. We should not judge them too harshly, for they were trained and lived in a different age. But that we should allow their mistakes of fact, their legal misconceptions, their economic obtuseness, their partisan passions and prejudices, to reach down through the decades and make law for us in regard to some of our most vital interests—this is hard to explain on the theory that we are an intelligent, self-governing people.

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